IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

STATE OF ARIZONA, ET AL,	)	CIVIL ACTION NO. 6:22-cv-1130
Plaintiffs,	)	
vs.	)	JUDGE JOSEPH
MERRICK GARLAND IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ET AL	)	
Defendants.	)	MAGISTRATE JUDGE WHITEHURST

MOTION HEARING

Transcript of Proceedings before The Honorable David C. Joseph, United States District Judge, Lafayette, Lafayette Parish, Louisiana, commencing on May 18, 2022.

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(Lafayette, Lafayette Parish, Louisiana; May 18, 2022, in open court.)

THE CSO: All rise. United States District Court for the Western District of Louisiana is now in session, the Honorable Judge David Joseph presiding. God save the United States and this Honorable Court.

THE COURT: Thank you, please be seated. Good morning everybody. We're here this morning in 22-cv-1130, Arizona versus Garland. Counsel, please make your appearances.

MR. ST. JOHN: Good morning, Your Honor. Joseph Scott St. John on behalf of the plaintiff states.

THE COURT: Good morning.

MR. REUVENI: Good morning, Your Honor. Erez Reuveni on behalf of the defendants.

MS. KING: And Your Honor, Karen King, U. S. Attorney's Office, local counsel.

THE COURT: Good morning.

MS. KING: Good morning.

THE COURT: We are here on defendants' motion to transfer for lack of subject matter jurisdiction, Doc. No. 5 on the record. I guess, Defendant, it's your motion. Please proceed.

I have a number of questions for both counsel. Hopefully, we've come prepared to answer some questions about -- well, a lot of different things, but I will either wait till you

finish or I will interrupt you if it makes sense to interrupt you. Okay?

MR. REUVENI: Thank you, Your Honor. And I will apologize in advance both to the Court and particularly the court reporter if I start speaking too fast, so.

THE COURT: She'll tell you.

MR. REUVENI: I don't doubt it.

Good morning, Your Honor. Erez Reuveni for the defendants. So from the government's view, this is a fairly straightforward argument, and we've laid out the argument in our briefs. We've responded to the points that defendants make, but just at a very high level, we have a statute here, a very specialized review provision. It's not your normal venue provision. It's a subject matter jurisdictional provision that provides that these sorts of cases -- and I don't think the parties really dispute in their briefs that this is a case that implements the relevant -- or the rule in this case, I should say, is a rule that implements the relevant statutory provision. That's 8 U.S.C. § 1225(b)(1) which governs what's called expedited removal.

So the parties don't really disagree about that, and I think if you agree with the government that this is a case about a rule that implements that provision, it's open and shut. Where the parties disagree is does this apply, this provision apply just to individuals, or does it apply to everybody, and so that's

really where the disagreement lies, and I can focus my discussion there. The plaintiffs make three arguments basically.

THE COURT: Well, I'll tell you right now, I agree with your position. It says it applies to implementation of 1225(b). Okay. So that's not the issue. The issue is whether this IFR is in the scope of 1225 and whether or not the plaintiff agrees with you on that or not, I don't necessarily agree. So we need to focus our inquiry on that. Is this regulation within the statutory scope of 1225? I don't know that it is.

MR. REUVENI: Okay. Absolutely happy to focus discussion on that, although just to set the table, plaintiffs don't disagree with us on that. I understand that you need to make your own jurisdictional finding.

THE COURT: I determine jurisdiction, yes.

MR. REUVENI: Absolutely. Plaintiffs' position is, this doesn't implement that statute. It fails to implement that statute, which is sort of a circular argument that they find what we're doing unlawful. That is true about any case.

But as to the rule itself, so the statutory provision at issue is 1225(b)(1)(B)(ii). And just to paraphrase as quoted in the brief, it says essentially, once an individual passes what's called a credible fear screen for whether they are eligible to proceed in the next step in the asylum process, that person is held for further consideration -- that's a quote from the statute -- of their asylum application.

It doesn't say how to do that. It doesn't say what proceeding someone goes into afterwards. Since 1996 when the statute was first implemented, that was done through what's called a full removal proceeding under 8 U.S.C. 1229(a), but the statute doesn't say it has to be that way.

So if the government -- The government in 1996 was implementing the statute by issuing the rule saying do it this way, and now 30 some years later they are saying, we're going to implement it this other way.

And so both the regulation in 1998, which is being amended here, and this rule implements Section 1225(b)(1)(B)(ii). We know that because the rule itself -- for two reasons. First, the rule itself is littered with references to what we're doing in this rule is implementing, quote, Section 235 of the INA which is --

THE COURT: You mean the IFR. The IFR, yes, makes it very clear that that's what the department purports to be doing, yes.

MR. REUVENI: Yes. I mean, you have the citations in the brief. So there's two things this rule does. It sets up a process for further consideration, and I don't think the parties really dispute that that falls under 1225(b)(1), and then it provides for parole, it amends the parole provision, which is 8 CFR 235.3, and I want to point out that that provision is titled Expedited Removal of Inadmissible Aliens. So that's a

provision that has a number of subsections all intended to implement the expedited removal statute.

But the parole provision, 235.3(b), up until this rule there were two different provisions in that rule. One applies to individuals who have passed their credible fear screening and one that apply to those who have not. And what this rule does is amend that to apply the same rule to everybody, and it demands specifically 8 CFR 235.3(b)(2)(iii), (b)(4)(ii), and (b)(4)(C) and those all fall, again, under 235.3(b). So, again, it amends 8 CFR 235.3, a number of provisions there, all of which are implementing the expedited removal statute.

Now plaintiffs don't make this argument, so obviously the Court, again, has to decide what it needs to decide, but the plaintiffs don't make any of these arguments. They don't argue that the parole part is or is not implementing Section 1225(b)(1) or any other part is.

But again, if we look at the choosing that the rule does, it sets up a set of procedures for someone to have "further consideration of" their application for asylum, and that's 1225(b)(1)(B)(ii), and then it sets up a procedure for dealing with the detention of those individuals which again implements Section 1225(b)(1)(B)(ii) which says, shall be detained for further consideration of their application for asylum.

THE COURT: Okay. Just to be clear, have any prior regulations defined further proceedings under 1225(b)(1)(B)(ii),

is anything other than referring to another statute, particularly 1229(a) or 1158? Has any prior regulation attempted to make further proceedings something independent of other regulations or statutes, because that never happened before.

MR. REUVENI: Well, yeah. So let me answer your question two ways, because first, I think, it's undefined, and the agencies have taken that position since 1998 when they first implemented the provisions. So 8 CFR 235.3 and 8 CFR 208.30, they have essentially existed as they exist now until 2017, the prior administration made some amendments. Many of those were enjoined, some were not, and now this administration's take on amending those procedures, but in 1998, the agency did two things in the regulations. It says the statute does not define --

THE COURT: You said 1998.

MR. REUVENI: Yes.

THE COURT: Slow down a little bit. 1998, what happened in 1998?

MR. REUVENI: Well, let me take one step back. There are provisional regulations in '97 implementing this new system.

THE COURT: Okay.

MR. REUVENI: And then the final regulations went into effect in '98. So they did notice and comment and they got some comments and they made some tweaks, but they were essentially the same.

What happened in '98 was the agency recognizes that

this term is ambiguous and were charged with figuring out how to do further proceedings, and they say we're going to do this through 240 proceedings. That's the 8 U.S.C. 1229(a).

THE COURT: That's 1229(a).

MR. REUVENI: Yes, which is a proceeding that is not identified in the statute as determining whether someone is eligible for asylum, but these are proceedings to determine whether someone is inadmissible and thus removable under the new statute, but there's nothing in the statute that says you must do it that way.

In fact, also in 1996, and this encompasses practices from before the amendment to the statute, there are affirmative asylum applications, and those are filed not under -- those are filed not in full removal proceedings. That's a different thing. That's not what this rule amends.

THE COURT: But those are under 1158 and 1229(a), right?

MR. REUVENI: Well, they are not under 1229(a), Your Honor. So let me distinguish between those to provisions. 1229(a) is a process statute.

THE COURT: Yes.

MR. REUVENI: It sets out how --

THE COURT: How the proceeding is to go.

MR. REUVENI: How that particular proceeding is going to go.

THE COURT: Yes.

MR. REUVENI: 1158 is a substance statute.

THE COURT: Yes, and that's for affirmative asylum claims.

MR. REUVENI: Well, it's for every asylum claim, it's for every claim. So if this rule here were to amend the substantive eligibility criteria for asylum, for example, it would define what a refugee is, it would define what a particular social group is, these terms that appear undefined in the statute, it wouldn't be implementing Section 1225. It would be implementing Section 1158, and if that were the case, we wouldn't be here making that argument because that sort of rule is not channeled through this provision because it's not implementing 1225(b)(1) procedures. It's implementing substantive law that apply to a number of different areas, including affirmative applications, full removal proceedings, and these more expedited proceedings, but that's not what the rule does.

So in '98 the agency made the decision to have these process through 1229(a) for further consideration, but they are very clear on the rule. I don't have the cite on me. I'm happy to get it to you, so I'm paraphrasing from memory here, but they said, we recognize that the statute doesn't tell us how to do this. We think since this is a brand new thing, we're going to put it through these processes we are already familiar with, but we reserve the right to change this should we want to change this

later based on our experiences. That's in the final rulemaking.

A lot has changed since '98 and now. So in the last 10 years asylum applications have skyrocketed. Migration trends have changed. Back in '98 it was single Mexican adults primarily. Now there's a lot of different folks from other places that are seeking asylum. So the agency made the decision based on that to switch things up, but yeah.

So to your original question, in 1998 they made the decision further consideration would go --

THE COURT: My question actually was, has either agency, Department of Justice or Department of Homeland Security or, I guess, its predecessor the INS, have they defined further proceedings independent of referring to another statute or regulation?

MR. REUVENI: No, they haven't.

THE COURT: This hasn't happened before where they are saying, well, further proceedings are, and we're going to create what they are.

MR. REUVENI: Well, yes and no. I want to be clear here.

THE COURT: No. They are referred to another process, 1229(a), right?

MR. REUVENI: Well, what they have done before is we are going to put this in this bucket, 1229(a). They're not going to say, the statute here doesn't define it, we're going to put it

in a different bucket. They haven't done it exactly in that way, but they are implementing that language.

THE COURT: I would like to see at the initial, at the outset in 1998 when there is some discussion that you've referenced or some administrative record about the agency's interpretation of further proceedings in this context. What was said about it then?

MR. REUVENI: I'm happy to get that to you after the argument.

THE COURT: I think there's a congressional -- I think there's some legislative history on this about what congress meant by that. I think we've pulled some of that in our research. It may not exactly jibe with that. They may have intended for it to go through the 1229(a) process.

MR. REUVENI: Two responses to that. So yes, there is legislative history, but legislative history is really only relevant if the statute isn't clear. Here we're talking about judicial review. You and I right now are talking about the merits.

THE COURT: Yeah, but it bleeds into the merits.

MR. REUVENI: I don't think it does. I know plaintiffs take that position, but I don't think it does.

THE COURT: Well, I'm going to decide that.

MR. REUVENI: Certainly, Your Honor. I was telling you what our position is on that. The legislative history provision

that you referred to does say that that individual congress person believed it should go through a 240 proceeding, but if you look at the statutory text, I mean, it doesn't define it.

THE COURT: My problem is this, and I know where you're coming from. My problem is this. It doesn't say, for further proceedings which shall be determined by the department. It doesn't say that. It doesn't say anything other than "further proceedings." It doesn't give -- The statute does not authorize the agencies to make up what the process is. It just says "for further proceedings." It does not give the statutory authority to do that. That's my problem with it.

And so back, you know, you are wondering why we're talking about that in the context of a motion to transfer. I need to be convinced in order for the venue provision to apply that the regulation is in fact within the scope of the statutory authorization, and that's why I'm asking you these questions. Okay?

MR. REUVENI: Yep, I understand that, but if you were to jump ahead to the end. If you were to decide on the merits if you were to keep the case, I don't think that this provision authorizes what the government has done. You're interpreting Section 1225(b)(1)(B)(ii). You are doing precisely what, precisely what the statute says should be decided by a single court. That's the district court.

THE COURT: We'll get to that. We'll get to that.

MR. REUVENI: I want to point out in the statute cause you say -- you say this provision doesn't authorize the agency to do anything.

THE COURT: I'm not saying that.

MR. REUVENI: Not authorizing to decide how further consideration is supposed to occur.

THE COURT: Well, I think it's certainly ambiguous if not --

MR. REUVENI: Well, that's exactly it. It's ambiguous. Also in the statute when congress wants to say you can pick one and only one step provision, only one way to do a thing, it says so. And there are a couple of examples of that in 1225.

So for the record, 1225(a)(2) with respect to stowaways, it says, anyone who is a stowaway cannot categorically be put in a 1229(a) proceeding. They can only be put in an expedited removal proceeding. They are clear on that.

Later in the section we are talking about now, 1225(b)(2), so 1225(b)(2)(B)(ii), it says, Three types of people who are not entitled to a 240 proceeding, including stowaways, alien crewmen, and individuals that go through expedited removal.

So when congress says you must do one type of procedure or another type of procedure to determine -- and to be clear here -- it says to determine inadmissibility. It's not saying to determine asylum in those provisions.

THE COURT: Right.

MR. REUVENI: It says so. Here it didn't say so. Here, if I may speak on behalf of congress in 1996, they are setting up this brand new complicated, comprehensive immigration reform. Hundreds and hundreds of pages, many, many new provisions and subprovisions.

So congress doesn't always when it sets up a new system speak in specifics. Here they left it open for the agency, the INS at the time, and now DHS and the attorney general to figure out, this out as they go along. So what they have said is the substantive law for asylum, that's 1150(a), which this rule doesn't touch. If you are going to change that in certain ways, well, we've litigated this a lot in the last four or five years. If you are going to change the timing or the standards, congress hasn't told you you can do those things, although some of the courts have told us. But here --

THE COURT: Okay. Let's go there real quick because I am interested in that. What I don't see in either the briefing of either party or in the IFR which, you know, we have spent some time looking at, how does this, how does the Department of Homeland Security intend that this process work. Okay.

So an asylum officer -- well, an immigration officer refers someone to an asylum officer for a credible fear determination. A positive credible fear determination is made by the asylum officer. What happens next under the new process?

MR. REUVENI: Respectfully, I just want to quibble with

the premise a bit. I do think the rules spell this out, and I know the parties didn't really get into it, and if you want more briefing on that we're happy to give it to you.

THE COURT: I have other cases. I don't only have this one.

MR. REUVENI: Okay, Your Honor. If someone passes credible fear, the rule sets up a structure where that person is then referred to an initial, what's called an asylum -- an asylum process with an asylum officer, and that's a term that's defined in the statute, 1225 as well, someone who has specific types of training in asylum law and refugee law. And that person has --

THE COURT: But they are not lawyers, right?

MR. REUVENI: They are not lawyers.

THE COURT: They don't have to be lawyers.

MR. REUVENI: They don't have to be lawyers under the statute; but, no, they are not lawyers. When congress wants someone to be a lawyer, they say so, so immigration judges.

THE COURT: Well, congress didn't give them authority to decide asylum claims. They only gave them the authority to initially decide whether or not there's a credible fear.

MR. REUVENI: So we're on the merits again, but we disagree with that, and we haven't filed our opposition to the motion for preliminary injunction yet. That will provide our view on it. But again, high level here. This provision is ambiguous, process-wise, whether further consideration is

supposed to happen.

Now I know plaintiffs' position is that asylum officers don't have authority and that it didn't transfer when the Homeland Security Act set up the new Department of Homeland Security. We disagree with that too.

Asylum officers have always had authority to decide asylum claims. There's no rule that says only immigration judges can decide asylum claims. We know that because there's always been affirmative asylum process entirely outside the removal process.

We also know that because congress in amending the INA under the Homeland Security Act in setting up the Homeland Security Act, added the Secretary of Homeland Security to all these different provisions governing asylum.

So for example, 1158 says "as determined by the Secretary of Homeland Security or the Attorney General." Where congress wants to say "only the Attorney General," and here that would include immigration judges who fall under the Attorney General or asylum officers fall under the Secretary, it says that and it does that.

They went out of their way to amend it to say the Secretary. So even if that authority didn't exist in the past before the INA was amended in '96, it exists now because congress has gone out of its way and said the Secretary can do this too.

So you have a statute that says nothing other than

further consideration of the application. Unlike those other statutes I just was discussing with you, it doesn't say "it must be this proceeding or that proceeding." You mentioned legislative history. That's clear statutory tech in ambiguity, and legislative history doesn't really come into play when you don't have a provision saying, like we do here, do it this way or do it that way. Here you have one that says you decide.

THE COURT: Yeah, it's real clear, right?

MR. REUVENI: You figure it out.

THE COURT: It's all very clear.

MR. REUVENI: Well, that is the argument here if we get to the merits, totally understand. But anyway, back to your question "how does this work." Goes to an asylum officer. They take evidence, they do the things that they do similar, but not identical to an affirmative asylum application, and they either grant --

THE COURT: Look, I'm not -- I certainly haven't formed an opinion on that. I'm simply asking questions. Okay. So don't -- you don't have to try to convince me of that point. Again, I haven't received the government's response to the states' preliminary injunction, and that's certainly not something we need to figure out today, but I am trying to figure out what the process is, so let's go back to that.

The asylum officer makes a credible fear determination.

MR. REUVENI: Yes.

THE COURT: There's no -- no longer are they referred to the 1229(a) process. So what happens next?

MR. REUVENI: There's a new intermediate step. So they are referred to the asylum office at USCIS. That's a subcomponent of the department, and these asylum officers then, like I said, take evidence and interview the individual. They allow for an opportunity to have counsel or not should they choose, but it's designed to move quickly unlike the current process when it goes to a 240 proceeding, it takes years.

THE COURT: So an asylum officer makes a credible fear determination. Is there another asylum officer that then receives the case to make the asylum determination?

MR. REUVENI: That's correct.

THE COURT: A different asylum officer.

MR. REUVENI: I believe so. I believe so.

THE COURT: Because I think the IFR says that the credible fear determination by the first, number one, the first asylum officer, that fear determination is considered to be an asylum application, correct?

MR. REUVENI: That's correct. That's correct.

THE COURT: So there's no longer a need to fill out any additional paperwork or make any additional showing by the asylee.

MR. REUVENI: If I may just quibble with that for a second just to be clear. There is a need to make an affirmative

showing. That counts as the application. So right now under the current system, they have to file an affirmative application, make out their case, the credible fear determination plus whatever information is put before the credible fear interviewer. That counts as the application, but that doesn't bind the asylum officer who reviews it next. They can put in new evidence, and I would certainly recommend that they do. It's not etched in stone to be clear. What the first person does is not the end.

THE COURT: I'm getting to that. I'm trying to figure out -- I'm trying to figure out the process because, you know, you may live in this stuff, but I don't.

MR. REUVENI: I wish I didn't.

THE COURT: Well, you know, maybe you'll do something different, but I'm learning a lot about it. So the credible fear determination is made. That constitutes the application of asylum. So it takes out kind of this group of people that, for some reason, don't end up completing their asylum application. It says there's been a credible fear determination. We're going to move it to the next stage. There's another asylum officer, right?

MR. REUVENI: Correct.

THE COURT: Who then does what? What additional things need to be done beyond the credible fear determination to decide the merits of the asylum application?

MR. REUVENI: Well, what the second person does is,

quote, further consideration of the application for asylum.

THE COURT: Does that go under 1158 then?

MR. REUVENI: No, that continues under 1225(b)(1)(B)(ii). Again, 1158 is substance, the substantive law that is applied. These are procedures.

THE COURT: I'm asking about the substantive law now. What does the asylum officer use to make the final determination of asylum?

MR. REUVENI: That would be 1158 because 1158 defines or by reference to another statute, 1101(42) -- (a)(42), which is what a refugee is, and there's about five subcategories.

THE COURT: So you are saying essentially they use the same standards, the same substantive law as the immigration judges do now.

MR. REUVENI: And as the individuals who do the initial credible fear determination. And if I can take a step to the side for a minute, a credible fear screen happens quickly. It's just a screening mechanism. It's supposed to be done very quickly.

The statute provides that -- it doesn't speak to the asylum officer, but it provides an IJ who reviews a negative determination. It's supposed to do it within 24 hours. That doesn't normally happen, but it says up to seven days. That's a very fast process. So obviously you want to have further review to screen for error, both positive and negative.

But the current system, an IJ does that initially. This system, an asylum officer does that initially. Takes new evidence. Questions the individual about the alleged basis for refugee status, particular social group, political opinion, that sort of thing. Takes more documents, makes an assessment if the person is telling the truth or not, and if they grant, that's not really the end because there can be further review within the agency, but in the normal course, let's just for the sake of discussion say if they grant -- after the multi-week process occurs, that person is granted asylum, and if they deny the person can then appeal to the immigration judge or get referred to the removal proceeding.

THE COURT: If they grant asylum, then what further review is there in the agency? That's another question I have. Is there any -- I mean, there's not adversarial process anymore. So who would know to appeal? Who would think there's a bad decision? What do you do if there's an asylum officer that grants, you know, an inordinately high number of applications? What recourse, you know, does, quote, unquote, the government have?

I mean, you know, the role of the Department of Homeland Security now is to act as essentially the prosecutor and to try to make sure these claims are merit through the adversarial process? What appeal right does the government have? I mean, there's no longer adversarial process, right?

MR. REUVENI: Two responses. First by comparison, there's also now a review process from the affirmative asylum application that was granted. That doesn't exist either. But specifically to this rule, it's a little bit different. The rule in a number of places contemplates internal supervisory review, and this is a brand new work in progress, obviously. So you know, as the rule states, we're going to figure things out a bit as we go along. We're going to not roll this out all at once. We're going to take a few months to really just focus and try this out in a more focused manner.

But what the rule contemplates, as I understand, is that there's internal supervisory review. The Secretary or his designee actually retains the authority to review any single asylum grant, and that's not just here but also in the affirmative asylum context. And so I'm not suggesting that this is --

THE COURT: You are saying the Secretary can then delegate that down to a level where they can review the asylum grants on a more -- on a quicker basis?

MR. REUVENI: Yes, exactly. I'm not suggesting that the rule explicitly says, should any interested party disagree with the grant of asylum, they can do X, Y, Z. That's not in there to be clear, but what's in there is the supervisory review of every single asylum grant.

So the department does it in a number of other areas.

If it comes to their attention that asylum officer X is granting a hundred percent and asylum officer Y, she is granting 20 percent, that's a problem obviously. That doesn't really make a lot of sense, and there's mechanisms in the rule to figure that out.

And I could see a future where a policy is implemented saying, well, we're going to have to do more focused review on this office or this type of claim because we see what's happening here. But explicitly in the rule, no, it's not in there. But again, also, that's true about affirmative asylum grants. That's true about any immigration benefit that is granted outside the removal process. There is no adversarial process when someone gets work authorization, when someone is granted parole, when someone gets something like H-1B visa or a B1 tourist visa. That's millions and millions of applications that don't have review through the adversarial process. So I just want to push back a bit on the notion that there's something inherently suspect about a rule that doesn't have the IJ immediately --

THE COURT: Well, I guess one difference in this example that you are citing, do you know off the top of your head, you know, what percent of asylum grants are withdrawn at some point?

MR. REUVENI: I do not know that.

THE COURT: I mean, they turn -- would you agree most of them turn into green card status. They are here most of them.

MR. REUVENI: I would not agree with that.

THE COURT: Oh, you are saying some are withdrawn a lot.

MR. REUVENI: A large majority of asylum applications are denied.

THE COURT: No, no, the ones that are granted, are they then withdrawn later? That's what I'm asking.

MR. REUVENI: I mean, that sort of defeats the purpose of asylum, Your Honor.

THE COURT: So it's different than the visas you are talking about for people that are here for a limited period of time?

MR. REUVENI: Well, it depends if it's an immigrant or nonimmigrant visa. I'm happy to get into that, but there are millions of immigrant visas granted every year to family members or people --

THE COURT: You are saying there's not an adversarial system for the grant of those.

MR. REUVENI: Correct, Your Honor. No one can go to court and say I disagree with the agency's grant of this decision.

THE COURT: Yeah. I'm not talking about going to court. I'm talking about --

MR. REUVENI: Or even the IJ, Your Honor.

THE COURT: -- the processes for deciding these

situations.

MR. REUVENI: Right. So even -- all those, if they are granted by USCIS, and these are hundreds of thousands of applications every year, many of them as you identify result in ultimately a green card or work authorization and the right to stay here indefinitely if you don't commit crimes or do other things that would get you removed. None of that is reviewed by an immigration judge, none of it. It's all done by USCIS through so affirmative application.

So there's nothing unusual about that. The suggestion should it exist in the papers if there is, that this is some new nefarious different scheme outside the statute is not true because, again, hundreds of thousands of these things are granted every year by USCIS officers. And that's what the rule contemplates within DHS. There is supervisory review of every single case, and if something irregular is occurring, that gets to the supervisor's attention, and I have to believe that the government does its best to fix that. I mean, there's no evidence to the contrary yet. The rule hasn't even gone into effect obviously.

But to bring it all back, all of that, what we're talking about, Your Honor, is again how does the government implement, quote, further consideration of the application? Is there going to be an adversarial process at step one or no? Are we going to go straight to an adversarial process at step one or

not?

THE COURT: I would agree that's all further consideration, but, you know, again, back to why I'm asking these questions is, does the statute authorize the agencies to wholesale make the further consideration process up. That's the question I have, and that refers directly to your motion that we're talking about.

MR. REUVENI: Your Honor, just to respond to that. So let's say you rule against us on everything, right. Let's just jump ahead to the merits here, and you say a snippet of legislative history balanced against all these other things that the government argues about, that's it. That's the case cracker. We're done here. You can't do this. It's illegal.

You've still interpreted what the meaning of "shall be detained for further consideration" is. You've said, the statute doesn't authorize that, even though you think it was ambiguous and it does. So at the end of the day, you tell us we're wrong on the merits and we have many other arguments we haven't gotten into here, but I want to be clear, you are telling us what this provision which appears under 1225(b)(1) means, and congress was very clear on this. It wants one court to develop expertise on that. Doesn't want inconsistent judgments. All the usual rules you have for an exclusive venue provision like in the patent system and the Court of Federal Claims, many other examples.

We already have in the D. C. Circuit, you have four

precedent decisions on this, you have multiple unpublished decisions, you have dozens of district court decisions, and to be clear, I haven't got enough time to visit Lafayette. I'd be very happy to come back. My flights were late yesterday. I couldn't see anything. So we have no issue with proceeding in this court versus that court. The arguments are the arguments. We have full faith in any judge who will decide the case fairly to us, but that's not the issue here. The issue is, congress wants one court to do that. Once we accept that this --

THE COURT: Aren't there similar venue provisions for 1229(a)?

MR. REUVENI: Not like this. 1229(a), if you go through a proceeding, there are venue provisions that say you must go to a specific Court of Appeals. So if your proceeding arose in Texas, you're going to the Fifth Circuit. If it arose in California, you're going to the Ninth Circuit. There are other exclusive venue provisions --

THE COURT: What about 1158? Does 1158 have an exclusive venue provision?

MR. REUVENI: No, it does not.

THE COURT: I'm curious why. To me it doesn't make much sense, given the wide latitude the department has, very wide latitude to administer the asylum process, why the department chose this very tenuous toehold in 1225(b) to implement this regulation. It goes way beyond that. It's the expedited removal

statute. It's not the asylum statute.

MR. REUVENI: Respectfully, Your Honor, the expedited removal statute does explicitly contemplate asylum applications. It refers to asylum applications.

THE COURT: Wouldn't you agree it contemplates how to initiate asylum applications. It does not talk at all about how to determine asylum applications. Would you agree with that?

MR. REUVENI: I would agree that the statute doesn't define how further consideration is supposed to occur.

THE COURT: Okay. I'm curious why these regulations weren't, weren't invoked under the authority of 1229(a) or of 1158.

MR. REUVENI: Because these proceedings don't arise under 1229(a).

THE COURT: Well, they could easily -- they are already referred to 1229(a).

MR. REUVENI: That's exactly it, Your Honor, they could. They don't have to. They could.

THE COURT: 1229 could be changed to where that process is -- contemplates a different process for everybody.

MR. REUVENI: I think a statutory amendment to 1229 because there's no asylum officer involvement in 1229(a). That's an immigration judge, the statute says an immigration judge. The Attorney General --

THE COURT: You are telling me that the reason that it

was under 1225(b) is so the department could use asylum officers instead of immigration judges.

MR. REUVENI: Not exactly, Your Honor. The rule explains why they are using asylum officers. The immigration courts are overwhelmed. No one disputes that. There's a backlog of one-and-a-half million cases.

THE COURT: Okay. Good, I'm glad you brought that up. Let's talk about the process again. So we are to the asylum officer granting asylum. There could be supervisory review. Probably will be, and I don't doubt that at all. I'm sure there will be.

For the asylum applications that are denied, which you say are the vast majority of them now, and probably will be under the new process, then the asylum applicants have the chance to appeal that to immigration judges.

MR. REUVENI: I think you got caught on the nomenclature. The asylum officer denies. The asylum officer affirmatively has to refer them to that proceeding. So there's no getting out of that proceeding. The asylum officer initiates the proceeding, so to speak, issues a notice to appear, and they are put in this -- back in front of the world of the adject. It's very different because this is much more streamlined. That's the whole purpose --

THE COURT: Yeah, that's my question. How is it streamlined if they still have to go before the immigration

judges for the denial of asylum.

MR. REUVENI: So normal process, if you are not detained under current procedures and regulations, it takes years and years and years, and an individual who is in that position, usually gets let out of detention, gets work authorization, and those proceedings are then put on the back burner. That's why we have this problem.

What this does if it's denied, you have a very specific amount of time. The rule speaks of certain deadlines, 45 days, 100 days, 180 days. None of those apply to people who are coming into -- not coming into removal proceedings through this process. So the rule is setup, should asylum be denied, or release be denied at the asylum officer stage, to essentially set up a rocket docket and make these cases go much faster.

THE COURT: So you're saying an immigration judge has a particular amount of time to decide the appeal?

MR. REUVENI: Correct.

THE COURT: Okay. And during that time period, the immigrant is -- they are detained?

MR. REUVENI: Well, the statute, because again we're talking about this very specific statute.

THE COURT: Shall be detained.

MR. REUVENI: They can be released on parole on a case-by-case basis even under the current rule.

THE COURT: Right, but normally it's a short period of

time, so they are probably going to be detained for that period of time.

MR. REUVENI: Well, that's all going to depend on, as you know, there are a number of cases involving these issues percolating right now.

THE COURT: I'm not interested in that. That's not before us. I'm just trying to figure out how to streamline the process.

MR. REUVENI: So like I said, currently many years are going to pass before someone gets a final order of removal if they are coming under the normal system. Unless they are criminally detained or a dangerous person, they are not going to get a rocket docket decision.

This rule is they need to fix this admittedly glaring problem. We have, again, a backlog of hundreds of thousands of cases. These cases drag on for years. That doesn't help anybody. It doesn't help the government, doesn't help the community, and it doesn't help the individual who is or is not applying for asylum and some other form of relief.

I mean, to jump ahead to sort of what this case is ultimately about, it's surprising to me that the plaintiffs would prefer a system where many millions of people will be here much longer.

THE COURT: And that's the understanding which we're going to talk about with him in a minute. I have a lot of

questions on that, but I do need -- I am trying to get, you know, that IFR, you may have looked at this a lot. We read it. Emily over here read it a bunch; but, you know, I mean, it refers to a lot of different things.

MR. REUVENI: It's a long rule, Your Honor.

THE COURT: Yeah.

MR. REUVENI: It's a long rule. If we get to housekeeping matters, I know the parties filed a notice about scheduling, and that sort of thing, I can save that for the end.

THE COURT: We're going to talk about that. Assuming I don't send this to Washington, D. C., or dismiss it, we'll talk about that after this hearing, okay.

MR. REUVENI: Just to wrap up the sort of process how it works. So the rule sets up what I think is fair to call a rocket docket compared to current practices for people that, if the asylum application, at step one of, quote, further consideration is denied, they go to the rocket docket with an immigration judge, and those cases are designed to finish in a matter of months. Firm cutoffs. Under current system you can get endless continuances to find counsel and make your case. That's one of the big problems with the current system. This says, one continuance and you are done.

THE COURT: So the asylum application is denied by the AO. Okay. So there's positive fear determination, that's the prerequisite. Goes to the asylum officer who determines the

merits. Asylum officer says asylum should not be granted in this case. Automatically sent to the immigration judge. 45 days you said, something like that?

MR. REUVENI: Well, initial cutoff, 45 days, 120 days, 180 days. But the thing is supposed to be done at day 180.

THE COURT: 180 days final, and what happens if the immigration judge agrees with the asylum officer that asylum should not be granted?

MR. REUVENI: They can appeal to the Board of Immigration Appeals.

THE COURT: And how long do they have to do that?

MR. REUVENI: I don't know off the top of my head.

THE COURT: They are not deported at that point either.

MR. REUVENI: It's not done at that point, but under the current system you can do that without any expedition of the things that occur in front of the immigration judge. And under the appeal system after that, you are entitled to appeal to the Court of Appeals. That's in the statute. There's nothing anyone can do about that until congress changes its mind about that.

So what the agency is doing is what it actually has control over. It can move things along quicker. It can say less continuances. It can say we're going to put a bucket of individuals in front of asylum officers so that the immigration judges aren't so backlogged and they can focus on other more pressing matters. Move the immigration cases along so they can

get more removals and more final decisions. What the agency can't do is say, oh, also, we're going to bar you from going to the Board of Immigration Appeals in a normal removal proceeding because that's in the statute.

THE COURT: That's statutory.

MR. REUVENI: Yeah. A petition for review to the relevant Court of Appeals is in the statute. It's statutory.

THE COURT: Right.

MR. REUVENI: Reasonable people can disagree on whether that's a wise system. It takes a long time. Like I said, years and years in some cases, but there's nothing anyone could do about it if it's statutory. If the statute says explicitly --

THE COURT: Well, congress can do something about it. Congress can do something about all of this, right, but they don't seem to be able to do it.

MR. REUVENI: I think we can all agree on that, Your Honor.

THE COURT: All right. Let me see if -- I'll let you continue. Let me just see if I have any other questions on that point. So 1158 we reviewed that. That does seem to have some -- you refer to it as a substantive provision which generally it is, but it does seem to have some procedural aspects to it as well, doesn't it?

Do you have a copy of that, Emily? Can you run and go get it real quick? Thanks.

MR. REUVENI: Recalling off the top of my head, again, I don't -- It seems like the merits. I'm happy to respond.

THE COURT: I found a provision in there which kind of in one context gave authority for further regulation of the process.

MR. REUVENI: That strikes me as another example of why plaintiffs merits argument doesn't really hold water. You have provision 1158. I think I know the one you're referring to.

THE COURT: That's the point here. You have 1225(b) and the government issued the regulation under that statute. There's all kind of authority granted to the Attorney General and the Department of Homeland Security to govern asylum. So why that statute? That's my question, and that goes directly to the motion we're talking about here today, and that's what I'm confused about.

MR. REUVENI: Let me give you one clear example I know from the top of my head because we litigated this.

THE COURT: He wants to give one clear example, but he's going to speak fast on that.

MR. REUVENI: Let me give you a fast example that isn't clear. Give you an example that I'm aware of because we litigated this a lot during the last administration. As a provision of 1158, that allows the Attorney General to issue new substantive rules governing eligibility for asylum. I don't know it off the top of my head. It's 1158(b)(2)(C) maybe.

THE COURT: Yeah, let's see. (b)(2), yeah.

MR. REUVENI: I might be making that up.

THE COURT: No, I think you are right.

MR. REUVENI: But it's the one that says, such further requirements that the Attorney General may establish.

THE COURT: Yeah, okay, here it is. You're right. So it's (d), (d)(1) Asylum procedure, 1158(d)(1). Says "The Attorney General shall establish a procedure for consideration of asylum applications filed under subsection (a)" which is the --

MR. REUVENI: So let me answer that.

THE COURT: But it also refers to asylum in accordance with 1225(b).

MR. REUVENI: That's not the Attorney General anymore. That reference to Attorney General means the Secretary, so there's this provision --

THE COURT: I know, but my point is that's in 1158.

MR. REUVENI: Right, but that's talking about affirmative asylum applications.

THE COURT: Well, it's talking about both because (a) also talks about 1225(b).

MR. REUVENI: Again, I think that helps us, not the other way. There are two provisions, there's 1158 and also there's 1225, and what we're talking about is 1225. What we're talking about is further consideration under 1225.

THE COURT: What you have here is a statute giving

specific authorization for the then Attorney General, now the Secretary of Homeland Security to, quote, establish a procedure for the consideration of asylum applications, which is not in 1225. That's not in there. It just says further consideration.

MR. REUVENI: I mean, true to a point, but take another provision even broader than that one, 8 U.S.C. § 1103(a) and (g) which say the Secretary and the Attorney General have all the authority to do whatever they need to do to implement any provision under this statute. That's the authority invoked in the rule.

Just cause the Attorney General or the Secretary is invoking their general delegation of authority from congress to do their jobs doesn't mean they're not implementing a specific subprovision. They are exercising broad categorical delegation of authority that's found in 1103 to implement specific subprovisions, and when they exercise that authority to implement specific subprovisions, we wouldn't say colloquially they are implementing Section 1103, and no one in this case does say that. We say they are implementing specifically the provision that they say they are implementing, and the authority comes from another statute, the authority to do something, the delegation from congress, but that's 1103.

So when I take your point as to 1158(d) to set up further procedures, but my suggestion here is there are different types of procedures. If this rule is saying, here's what we're

going to do for affirmative asylum applications, or here is what we're going to do for an asylum process that has nothing to do with expedited removal, they would be implementing some other provision in 1225(b)(1)(B)(ii), but they are very clearly here focused on one thing and one thing only, individuals who have gone through credible fear and are in expedited removal -- and I know I'm being annoying at this point -- who are detained for further consideration of the application.

At the end of the day, I didn't see anything in plaintiffs' briefs quibbling with that. What I do hear them saying is it's an illegal implementation, but that again is circular and brings us back to the whole idea that, if everything is illegal, then nothing is covered by 1225(e) -- I'm sorry -- 1252(e).

THE COURT: I guess -- okay. I think I understand your position.

MR. REUVENI: But there was one another provision that I wanted to refer the Court to. Sorry, I didn't mean to interrupt if you had a question.

THE COURT: Go ahead.

MR. REUVENI: To give you an example, it would be the substance versus procedure. The provision 1158, it might be (b)(2)(C), it says the Attorney General or the Secretary can set up additional substantive requirements. And so there is a good example of something that has nothing to do with 1225(b)(1)

procedures. That's going to be substantive law.

In the last administration, we had a number of rules that said, to try to tighten up the requirements substantively for asylum, and in case after case, I mean, I was there. I had the misfortune of signing those briefs. So plaintiffs refer to a case, for example, East Bay out of the Ninth Circuit, and that case involved just such a rule. A rule that changed, one, the eligibility requirements were found, implementing 1158, and also had a rule saying we are going to apply mandatory bars to asylum, which is something the provision allows for, in expedited removal procedures.

And the case in question there said, I don't think the first thing is covered by this claim channeling provision because it doesn't implement 1225. It implements substantive law under 1158, but I do think the second thing is covered, because those procedures apply explicitly only to some subprovision of 1225(b)(1). And the Court said pretty clearly, I lack authority to enjoin or issue any relief as to that, and I' not going to touch that.

What I do have authority to do is enjoin something implementing 1158. We think if you are going to look at cases like East Bay, our situation falls squarely within that carve-out that the Court recognized as to implementation of procedures implementing 1225(b)(1). And again -- I'm sorry. Did you have a question, Your Honor?

THE COURT: Oh, no. I understand what you're saying.

MR. REUVENI: I have just a practical consideration.

THE COURT: Yeah, I like that.

MR. REUVENI: Okay. To be fair to plaintiffs, and this is the only thing I will agree with them on in this particular issue. It is true that there is no case out there involving a state party challenging something to do with expedited removal that I'm aware of.

That's not a real argument for a pretty clear statutory provision on venue, and exclusive jurisdiction doesn't apply. They have their arguments. We have ours. They say individual. We say it doesn't apply to individual, but as I said when I started, if you think this does implement Section 1225(b)(1), it would be pretty -- you'd be the first court, you'd be the first judge to say, Well, nevertheless, it doesn't go to DC. There's no case out there.

What we do have is individuals and we do have organizations. A lot of cases with organizations. Some of them do in fact challenge 1225(b)(1) procedures, some of them don't. And court after court has said this has to go in front of D.C.

THE COURT: And those cases were probably having to do with expedited removal, not creating a new asylum process under 1225.

MR. REUVENI: Well, yes and no. Again the East Bay example doesn't.

THE COURT: The expedited removal statute, congress wanted it to be reviewed in one place because they didn't want courts all over the country getting involved in the government trying to expedite removal of aliens. That's the reason it's there.

MR. REUVENI: That's exact, but also the rules and policies that go --

THE COURT: Wants to create a whole new asylum process by some little phrase within a statute.

MR. REUVENI: Your Honor, I think we're again conflating merits and --

THE COURT: No, it's not. It's actually not. Is this IFR within the scope of 1225? That's what I'm trying to figure out. That governs my decision on whether to transfer this.

MR. REUVENI: We agree with that. And again, you are asking me a lot of questions.

THE COURT: I don't agree that they say that it is. What if the government -- example. What if the government decided that they would issue a regulation under, purportedly under 1225(b), you know, regulating the export of crawfish from Louisiana. I'm just saying, and then would that have to be brought in DC because, oh, it's under -- we're saying it's under 1225(b). So you have to bring it under in D.C. We're saying it is. We're saying it's under 1225(b). Therefore the scope of that statute has to be reviewed in one place.

MR. REUVENI: We're not saying what matters is what we say. You obviously have to look behind --

THE COURT: Well, I think it's clear there are other statutes that are much more relevant to the asylum process than 1225(b), and I don't know why the regulation was issued under that statute. That's my problem.

MR. REUVENI: There's no other statute that governs, that the plaintiffs have identified or that we discussed today.

THE COURT: I think the plaintiffs haven't identified. They also say that the Texas v. Biden case governs this inquiry.

MR. REUVENI: I'm happy to give you Texas --

THE COURT: It's not even close, but anyway.

MR. REUVENI: Okay. So you don't want me to talk about Texas?

THE COURT: No, I don't.

MR. REUVENI: Because I do agree with you that it's not even close. But to go back to the beginning here, I hear everything you are saying. Your Honor, there are these other provisions that -- well, at least in our view, articulate substantive criteria for asylum applications across the board, and if --

THE COURT: I mean, the phrase is "shall be detained pending further consideration."

MR. REUVENI: Right.

THE COURT: Congress's intent in that phrase was that

they be detained pending their asylum claim adjudication, not that the statute authorizes the agency to create a new asylum process. I mean, to me it's not even ambiguous. It's not -- there's no -- The statute does not give the authority for the agencies to make this process up. That's my problem. That goes to the venue issue to me because I don't see that it's rationally related to that statute to have a new asylum process, and I know maybe the states don't argue that.

MR. REUVENI: Well, your Honor, I just have to respectfully --

THE COURT: They filed it here and I gotta figure out whether to keep it or not.

MR. REUVENI: Understood. I just have to respectfully disagree, and I know I've said this a few times, so I'll just try it one more time and we can just move on, and I won't take up more of your time on the same point.

But there's no other provision, no other statute anywhere in the INA. We would have told you if there was. Plaintiffs haven't identified it, which says, do something more if this initial things happens, but doesn't tell you how to do it. That's exactly what the statute is. Now, if you have someone, if you put out a rule saying --

THE COURT: Well, maybe the only answer is to refer it to 1229(a) then. Maybe that's the only answer because that's all that congress has authorized. There's no other further

consideration available. Maybe that's it. Maybe that's the answer, but it still doesn't necessarily authorize a statute to create a new asylum process that congress hasn't authorized or congress doesn't say you can do, so anyway.

MR. REUVENI: Again, the way you are framing it, Your Honor, you are saying, well, I don't think it actually is authorized, if we could jump to the end, and actually the only thing they can do is 1229(a). That's a merits conclusion. That's not a jurisdiction conclusion.

And I know plaintiffs say, well, it sort of touches on it, it's intertwined, and you and I have talked about that, but there's nothing that the determination of whether this implements an expedited removal procedure, nothing about that that turns on whether the government is right or wrong on the merits.

And I think there's an instructive case on this that we cite in our briefs and actually every case that arises under this context has a species of this argument. Just recently last year the D. C. Circuit had a case called MMB. Plaintiffs argued all sorts of things, including due process and the First Amendment, challenged a bunch of procedures implementing expedited removal, and have the same argument that what they are doing is illegal.

So this is what I refer to as plaintiffs' circular argument. It's not actually authorized. This is the only thing that's authorized. Then that still challenged the expedited removal procedure, and the government's chosen means of

implementing it.

And I take the point that that's a case that arose by choice in the D. C. Circuit, so it doesn't necessarily tell you whether your case has to go to the D. C. Circuit, but if that case arose anywhere else, I'd be very surprised to -- if the conclusion was that case doesn't have to go to the D. C. Circuit.

I mean, it's the same -- it's on all fours with this case but for one thing. There's state plaintiffs here, individuals there. And one of the cases we were discussing unauthorized here, other than it was organizations instead of states, and there are multiple cases involving organizations that arrive in the District Court for the District of Columbia, and there are cases that have been transferred to the District Court of the District of Columbia, and we do have --

Let me just retreat to the end on the assumption you may not be buying anything I'm selling. If you think any part of this case is implemented by section -- does implement Section 1225 because there are a number -- like you said, there are a number of different parts of the rule, and if you think the parole thing doesn't fairly implement 1225, although we've explained pretty clearly why. We've cited cases.

THE COURT: Yeah. Then this part should be dismissed, probably, right?

MR. REUVENI: Yes, those parts would be dismissed.

THE COURT: Yeah, I've thought about that.

MR. REUVENI: We cite a case out of D.C. that did this, severed and transferred and dismissed that arose in the context of some family separation cases in the last administration, but they were challenging other things, family separation, and they were challenging expedited removal procedures. And the Court split it in two. We think you should transfer and dismiss the whole thing. On that I want to be clear. We're not trying to avoid judicial review.

THE COURT: I know. I would have filed the same brief if I was in your position.

MR. REUVENI: We just want it to go to D. C. because that's where -- Speaking practically. Let's say we stay here, and again, I would Love to come back in some other context, of course, to see the city, but we go through all this. We litigate the case. You decide the case one way or the other. Somebody wins, somebody looses. Guaranteed to be an appeal. Go up to Court of Appeals. We have this jurisdictional thing hanging over us. Maybe the Fifth Circuit disagrees, maybe the Fifth Circuit agrees. Now we have to start back at square one. How does that help anybody?

And if we don't stop there, then we go to the Supreme Court. We could have a situation two years from now where some sword of Damocles in the jurisdictional statute is hanging over the case. Transferring it to D. C., apart from the fact that we think that's the only court with jurisdiction, takes that off the

table, that's gone, and plaintiffs can get, and the government, because we'd like clarity too, can get a decision quickly, and there's no jurisdictional -- no jurisdictional morass hanging over this at all.

And again, the statute itself, 1252, it says, move fast. It says, decide this case quickly. It says, you must take an appeal within 30 days, instead of the usual 60. It says, the Court of Appeals has to decide the appeal as quickly as possible. It's all in the statute. Congress wants this decided quickly by that court.

We proceed here or any other of the 92 district courts outside of D. C., excluding this one, none of those provisions would necessarily apply. I mean, we would argue they would, if we are going to event a new extra statutory expedited removal proceeding outside of D. C., the same rules should apply, and the plaintiffs would disagree with that, that there's limitations on injunctions, there's limitations on declaratory relief, there's limitations on what can be reviewed, written versus unwritten, that sort of thing, but at the end of the day, we're going to go through this whole process, and years from now we may get a reversal on jurisdiction. That helps nobody, because then we're back at square one and have another manufactured emergency we have to deal with.

So even aside from the clear jurisdictional, it's a good reason to transfer, just to take that off the table so the

government doesn't argue that or a higher court on its own says, actually, I don't think anyone had jurisdiction here.

THE COURT: Yeah. A few more questions for you. What's the government's projection on the impact on the number of individuals receiving asylum under the new IFR once fully implemented?

MR. REUVENI: I don't know that off the top of my head.

THE COURT: Is that in the record? Is that in the administrative record, do you think?

MR. REUVENI: I don't know if that's in the IFR text itself. I'm not sure. I can go back and check, but if anything, if it's not in there, it's going to be expanded upon in an administrative way.

THE COURT: That would be something the government would look at in issuing this probably. They would have to.

MR. REUVENI: Yeah, I think they will clearly make projections on what the savings to the government are balanced against the resources needed to set up this new system. I think it says 15 percent of cases that would go to the IJ, the immigration courts, will potentially be taken off their docket.

I don't know if it specifically says they expect to grant or deny a certain number. I mean, that would be odd for them to say that ahead of time without knowing what the claims are.

THE COURT: Right, but, you know, in any kind of, you

know, ask the insurance business. In any kind of large enough number, they can assume that a particular action will have an impact on the number of positive asylum claims that are eventually granted.

MR. REUVENI: That I don't know. I think it's plaintiffs' argument. They seem to cast aspersions on asylum officers as being more inclined to grant asylum. I don't know that to be true or not.

THE COURT: I don't think that's what I'm asking.

MR. REUVENI: I know that the rule articulates costs and benefits pretty extensively. If you'd like us to go back and give you --

THE COURT: No, it's something I'm interested, but that's for later. What's the percentage of the asylum officers' credible fear determinations that are ultimately granted asylum under the current process, the 1229(a) process? Do you know?

MR. REUVENI: Not off the top of my head. I do know that under -- there were a number of rules that were issued during the last administration. They are also discussed in this one. Did some assessments of that, but I think it's very low, low. So most people fail the credible fear stage, and those that don't, most of those people don't get asylum.

Ultimately at the end of the day, and I want to caveat because I'm just sort of paraphrasing statistics here.

THE COURT: Yeah, I'm not going to hold you.

MR. REUVENI: We're not doing more than 1 out of 10, I think. I mean, I can come back and get you the number.

THE COURT: All right. Of the credible fear, there's about 10 percent of people who have been determined to have a credible fear, about 10 percent ultimately get asylum or something like that. All right.

MR. REUVENI: And I will ensure if I learn that not to be the case, I'll let the Court know.

THE COURT: Thank you, appreciate it.

MR. REUVENI: I can say one other thing that's not -- it's not in the record, but I raised this with my clients because I wanted to have it ready to discuss if we are going to get to scheduling and housekeeping at the hearing, and I identified it in the -- our portion of the joint notice that the parties filed identified it. As I mentioned earlier, the rule does say it's going to be rolled out pretty slowly and deliberately. This isn't going to drop like a hammer all at once.

They are going to target our focus. We have to train our asylum officers. They have to get the resources up and running. They are going to do it in specific locations. There's a lot of things -- We have months to go before this thing is rolled out full steam nationwide.

THE COURT: Yeah, I understand that. I understand generally how the government works.

MR. REUVENI: I want to say the departments anticipate

in the short term, we're talking a few hundred applications a month at most. I know that doesn't quite answer your statistical question.

THE COURT: What do you mean by "short term"? What are you authorized to mean by "short term"?

MR. REUVENI: Beginning May 31, I mean, I can give you a direct quote. Beginning May 31st, they anticipate putting no more than a few hundred people in these proceedings because that's the capacity they have, that's the resources they have. They don't have this up and running.

THE COURT: For how long?

MR. REUVENI: That I don't know. I mean, I'm sure it will increase.

THE COURT: Till June 3rd they are going to do a few hundred, and then starting June 3rd, it's full bore?

MR. REUVENI: Look I'm not swearing this under perjury, under the threat of perjury.

THE COURT: We'll talk about this later, but I'm, you know, I understand that we have to -- we're not -- I'm not going to do anything until I'm convinced it's the right thing to do, so, you know, timelines are great. The government has its prerogative. The executive has its prerogative. If the executive branch takes an action, then it's under review, then I'll decide that when I'm able to decide it, but we'll talk about that later.

MR. REUVENI: Yeah, I was just raising that primarily for the scheduling issues since plaintiffs view there's some sort of immediate emergency. I don't know if you have any other questions.

THE COURT: No, that's pretty much it. I appreciate your illuminating some of these issues for me. It certainly helps.

MR. REUVENI: I didn't ask at the outset, but with the Court's permission, I just request a brief opportunity for rebuttal if anything comes up.

THE COURT: You want to speak to me again, you are saying?

MR. REUVENI: Yes.

THE COURT: All right. You can.

MR. REUVENI: After the states tell you what they have.

THE COURT: We'll let Karen speak next. How about that?

MS. KING: I object.

MR. REUVENI: I don't think she wants to, Your Honor.

THE COURT: Mr. St. John, would you like to respond?

MR. ST. JOHN: I would, Your Honor. We've been going about an hour. Would the Court indulge a five-minute comfort break?

THE COURT: Yes.

MR. ST. JOHN: I appreciate it, Your Honor.

THE COURT: All right. Court will be in recess until 10:10.

THE CSO: All rise.

(Recess taken.)

MR. ST. JOHN: Good morning, Your Honor.

THE COURT: Are you representing all the states?

MR. ST. JOHN: I am, Your Honor.

THE COURT: Do you have different kind of socks on with different flags?

MR. ST. JOHN: Pretty much, Your Honor.

THE COURT: Okay.

MR. ST. JOHN: I think we're generally centered in the SEC, so.

THE COURT: All right. Your SEC socks on.

MR. ST. JOHN: Yes, Your Honor. Having listened to Your Honor's questions, I'm not going to belabor the Texas v. Biden point.

THE COURT: It wasn't interpreting 1225(b). In the implementation, it didn't say the implementation of 1225(b), we have explicit words saying that there's a venue provision dealing with 1225(b) and its implementation, and Texas v. Biden does not address that.

MR. ST. JOHN: It does do one important thing, Your Honor. My colleague from the federal government made an important concession, quote, you obviously have to look behind

the screen, end quote, and that was the point, I think, Your Honor made with the, you know, what if it were a regulation nominally tied to the immigration code.

THE COURT: Yes, I was just actually talking with my law clerks about this. You know, 1225 is the expedited removal statute, and the venue provision mandates determinations, which if you look at the statutory text, it's the determinations by the immigration official and the asylum officer. The challenges to that can be brought at D. C. in the implementation of the statute.

But again, it's the implementation of the expedited removal statute. It's how the executive branch is removing people from the country. That's what congress meant by including that provision in there. And it may apply broader than that which is why we're talking about it, but the question is, does it reach to a new asylum process that is -- has a little toehold in this further consideration language.

MR. ST. JOHN: Your Honor, I think there are a couple ways to look at it. One I think Your Honor has kind of previewed the elephants and mouseholes canon given the coverage of powers throughout the immigration statute, this is fitting, not one elephant but a whole heard of elephants in a very tiny little mousehole that seems a very odd place for that herd of elephants.

There's got to be a, a look, at least a superficial look at whether the claim, the government's claim is colorable,

and this is not unique. Kind of a peek at the merits, and even in an immigration context, the Supreme Court in a case called Kucana, 558 U.S. 233, rejected the idea that the executive gets a free hand to determine the Court's power by just declaring. And that was the point I was trying to make about Texas v. Biden. It did the same thing. It's a peek behind the curtain. It's bound up in the merits.

East Bay, that is a little more squarely on point. Same thing, a peek behind the curtain. The government obviously claimed the statute applied, and the Ninth Circuit took a look at that, squinted and said, no.

THE COURT: That's that Northern District of California case?

MR. ST. JOHN: I believe it came out of the Southern District.

THE COURT: Yeah, there's a Northern District and a Southern District one, I think.

MR. ST. JOHN: Right, and the Ninth Circuit was 993 F.3d 640. Just like the Fifth Circuit, the Ninth Circuit emphasized that the purpose in the claim channeling looked at the overall picture of the statute, and you look -- you then apply the elephants and mouseholes canon, and it's just not a colorful claim what the federal government is trying to do here.

THE COURT: And you're relying on venue -- you're relying on the APA's venue provisions, correct?

MR. ST. JOHN: APA and I believe it would also be just the general, the general venue provision. There is a take care --

THE COURT: Suits against the United States, correct? Suits against the United States, federal question and the APA.

MR. ST. JOHN: Yes, Your Honor.

THE COURT: And suits against government officials, correct?

MR. ST. JOHN: Yes, Your Honor. A federal court has jurisdiction.

THE COURT: All right. Do you want to add anything else to that?

MR. ST. JOHN: What I was getting at with the taking a peek, there's a lot of support for that in a lot of areas of the law. You see it in the transfer, right, and the futility provision of transfer.

THE COURT: Get to the substance of what is really going on in the case, what the operative facts involved are, and then make the venue, and then make the jurisdictional determination?

MR. ST. JOHN: Yes, Your Honor.

THE COURT: Is that what you mean by "take a peek"?

MR. ST. JOHN: Yeah, you have to take a peek. The Court has to take a peek at the merits to make sure that the claim is colorable. Otherwise you are giving the executive

unlimited discretion just to say, oh, it's --

THE COURT: Set-aside.

MR. ST. JOHN: Provide a fig leaf cover. That's what they seem to be doing in East Bay. You take a look at the regulation that was at issue there. It's got all kinds of citations to 1225(b), and the Ninth Circuit said, no, nice squint, but that's not within the scope of 1252(e)(3). I think the states' position is pretty straightforward. This just isn't covered. It's -- the Court has to take -- we think, you know, I've got to say for the record --

THE COURT: You agree that the statute says the implementation of 1225(b), claims, you know, involving the implementation of 1225(b) can be brought in the District of Columbia, but your contention is it's not properly brought under 1225(b). The regulation is not properly issued under 1225(b).

MR. ST. JOHN: Correct, Your Honor. The standard that you see in the, kind of the take a squint -- or take-a-peek cases, there's an older Fifth Circuit case, just as an example, United States v. Feaster, 410 F.2d 1354, where the error on the merits is obvious on the face of the papers. That's a violation of specific statutory language, or the government's action is plainly beyond the bounds of the statute or clearly in defiance of it, and that's Count 1 and Count 2 of our complaint. There is on point statutory language that is controlling and this elephant is contrary, plainly contrary to that statutory language. So

apply the "take a peek."

THE COURT: Okay. Couple of questions for you. And we'll talk about this more later, but how does the state contend that this change -- You heard government counsel talk about, you know, the reasons for the change in the asylum process and, you know, moving it to the Department of Homeland Security to promote efficiency and to promote a faster resolution for denied, for both granted and denied asylum claims. How does this change the illegal immigration picture?

MR. ST. JOHN: Let's look through the efficiency argument, Your Honor. This is an administration applying its policy. There's been a change in administration. That's fine. This administration is politically disposed to high levels of immigration. Expediting the asylum process is going to increase levels of immigration, and not only is it going to increase the number of asylees, it's going to act as a magnet to pull in more.

THE COURT: It looks like -- and I haven't spent enough time with it to get a full grasp of the picture, but I did look at the standing portion of the preliminary injunction motion you filed, and seems like the states are basing their standing on an expected increase in illegal immigration. I'll tell you it's not at all clear how that happens under this regulation to me.

You know, start out saying it may result in a higher number of asylees, which the government may have information. You're going to have a chance to look at that, but then it leaps

real quick to illegal immigration, which to me is a non sequitur and not at all sufficient to establish standing to bring this.

That's a gateway matter for me, that there has to be a plausible likelihood of establishing standard to proceed with the preliminary injunction, and we'll talk about that in a minute, but I guess I just want to ask you, how does that supposedly work? I mean, there's more people pushed into the asylum claim. Wouldn't that make more people likely to want to encounter an agent if they thought the process would move quicker? Wouldn't that push people away from illegal immigration to actually try to go through the defense of the asylum process.

MR. ST. JOHN: The issue is there are a very large number of claims of asylum that are nonmeritorious, and Your Honor hit on it asking about the statistics. And my recollection is similar. I don't have it in front of me, but the asylum officers have a very high error rate, we'll put it like that.

THE COURT: You're talking about the error rate being between the credible fear determination and the ultimate disposition by the immigration judge, it's a low percentage you're saying.

MR. ST. JOHN: Yes. There's a very -- there are a very high number of credible fear determinations and a very low number or small percentage that are --

THE COURT: Your assumption is that these credible fear determinations would go on to be a grant of asylum, and that's

what I was asking about the process. I don't know the answer to that. Government's counsel seems to think there's yet another asylum officer that's going to review that, under the same standards the immigration judges are now, and it's not going to be same thing as credible fear determination.

MR. ST. JOHN: That's not how we read the rule. The rule seems to indicate there will be some determinations that are binding or preclusive subsequently as a review. There's also an issue with the nominal review being provided under the new rule, being by, we'll say, more politically accountable officials, or to put it more directly, they are much more easily swayed by an administration versus the immigration judges that have at least some measure of independence.

THE COURT: What are the terms for immigration judges? They have a 7- or 8-year term or something like that?

MR. ST. JOHN: Your Honor, I don't know off the top of my head. There's a measure of insulation. It's not Article III, but it's there.

THE COURT: Do you think it might be like a small town police officer that's encouraged to increase his quota of traffic tickets or something like that?

MR. ST. JOHN: Right, they may or may not be able to issue a written order saying "I want more traffic tickets." Sure, there are those.

THE COURT: There's more opportunity for influence that

may change from administration to administration you're saying.

MR. ST. JOHN: Absolutely, Your Honor. Setting aside that, any increase in immigration is necessarily going to impact the plaintiff states. Well, you've got Plyler v. Doe. We have to educate the kids.

THE COURT: Yeah. And I think the states may be able to prove that, but I mean, I haven't seen it. All that's been talked about in the affidavit, looks like it may have been from a different case, but it talks about increase in illegal immigration. Here we're talking about a possible, although not certain, a possible effect on the number of asylum, granted asylum applications. That's what we're talking about.

MR. ST. JOHN: Well --

THE COURT: And there may be, you know, there may be some link to illegal immigration, but I think that's pretty farfetched, and I guess I'm the one that decides standing, so.

MR. ST. JOHN: That's fair, Your Honor. I would say that that is not the issue that's before the Court today, and I will confess I was not fully prepared to discuss standing.

THE COURT: No, we'll talk about that in a minute. We're going to have some more on that, but I just have some questions I wanted to ask. Let's see. All right. What else do you want to say to respond to the government's argument and the motion to transfer?

MR. ST. JOHN: Your Honor, I agree with my colleague,

it's briefed, it's well briefed. If Your Honor has questions, I'm happy to answer them to the best of my ability. The plaintiff states see Texas v. Biden as controlling. I understand Your Honor disagrees. Difference of opinion. You are in the chair, Your Honor. That's your decision, but even beneath that, you've got to kind of "take a peek" which is what Texas v. Biden and East Bay did. My colleague disagrees that you can take a peek. I think you have to. Otherwise you run into the problem with the Supreme Court who condemned in Kucana of the executive having free hand to decide whether or not something would be --

THE COURT: Well, it's not just having to do with the court. It's really having to do with congress. I mean, congress, it's kind of, just kind of ipse dixit. They say a regulation is issued under a particular statute, and it kind of overrides congress and the judiciary by doing that if it's not in fact related by the statute. That's my concern. I think I made that clear to everybody.

Would the government like to respond?

Is that all you've got, Mr. St. John?

MR. ST. JOHN: I believe so, Your Honor. I think there are some extraneous factors that the Court should consider. We are not normal plaintiffs, the states are not normal plaintiffs. A large number of states in the union came to this Court and waived their sovereign immunity to come in front of Your Honor. That's a big deal, and the choice of venue I don't think should

be disregarded lightly. Certainly not unless the statute unquestionably commands it, that a subsequent reviewing court may ultimately disagree on the jurisdiction. That is not the ground to be considered in the Court's transfer decision, Your Honor. That's a decision for Your Honor to make without considering what --

THE COURT: You're saying the other factors, judicial efficiency, those are not proper considerations you're saying?

MR. ST. JOHN: Correct, this isn't a typical transfer motion where it's transfer for the convenience or something like that. This is a -- The transfer motion was brought under a specific statutory provision. If the statutory provision is met, okay, transfer. If it's not met, then you've got a pile of sovereign states that came to this Court, and that decision should be respected.

On the Transfer versus dismissal, if the Court were inclined to transfer, we would ask that only the claims that the Court concludes have to be transferred be transferred. Again, a large number of sovereign states have come to this Court, and that decision should be respected.

So if on a count-by-count basis, counts don't need to be transferred or fall outside of the statute, and certainly I would think Count 1, County 2, and Count 8 fall outside of the statute, then those counts should stay here. I would ask the Court not to dismiss. There is a clock on the ability.

THE COURT: So the states would prefer a transfer to dismissal?

MR. ST. JOHN: Yes, Your Honor. I do want to hit on the stakes. This goes to the calendaring. The states' theory is essentially that asylum decisions are being placed in the hands of officers who have no authority, and they would be void ab initio. So you can say it's a few hundred a month, escalating to thousands a month. You talk about a efficiency disaster problem for the Courts and for the asylum system if six months from now a court agrees that, hey, these are void.

So you've got hundreds or thousands of asylees that are in limbo and are now to be reprocessed. So I would ask the Court to consider that, as we shift to calendaring and discuss calendaring.

THE COURT: Knowing that there's judicial review of this provision, I think there's another court that has a similar case. Isn't that the executive's problem if they choose to go forward with it, knowing it's under judicial review? I mean, it's their problem if they tell some of these individuals they have asylum and then later have to tell them that they didn't have authority to do that.

MR. ST. JOHN: Absolutely, Your Honor.

THE COURT: So I don't know how that's states' problem or the Court's problem. It's the executive's problem.

MR. ST. JOHN: It is the executive's problem, I think.

There is a rule that has been in place for a couple decades now very successfully. We've asked the plaintiffs -- or we've asked the defendants to delay to permit orderly resolution. They've declined.

So, yes. I mean, there is a -- I just wanted to alert the Court to the possibility of what are the downstream consequences if the rule, the I bar goes into effect, and there isn't judicial guidance on.

Does Your Honor have any other questions?

THE COURT: No, I think that's all I had. Anything you think we need to beat the horse more on?

MR. REUVENI: I don't want to beat the horse, Your Honor, but I do have one or two things, and I did promise to give you something before. I just want to update you on that.

THE COURT: Okay, yeah, great.

MR. ST. JOHN: Your Honor, one housekeeping matter, just to alert, another thing to alert the Court. There's an identical motion pending before Judge Kacsmaryk in the Southern District of Texas, in Texas with Myorkas, that's 2:22-cv-94. Texas brought it's own independent case.

THE COURT: Yeah, that's the one I was referring to. I'm aware of that somewhat, although I don't know anything about what stage they are at.

Yeah, looks like 12.6 percent of credible fear determinations were ultimately granted asylum. You're right,

you're about right, 12.6 percent. You said 10 percent.

MR. REUVENI: Lucky guess. That sounds about right. I remember saying it. Thank you, Your Honor. Just before anything else, if the Court is going to go take up the rest of the morning, I just ask that you give me an opportunity to change my flight.

THE COURT: What time is your flight?

MR. REUVENI: 12:21, so that may have been a bit ambitious on my part.

THE COURT: No, no, we're going to be done in an hour.

MR. REUVENI: Okay. I mean, I can change it then if I need to. If we go until 12, I lose the opportunity.

THE COURT: Do you check luggage?

MR. REUVENI: No, I don't need to check luggage.

THE COURT: Then you'll be fine. You'll be able to make your flight.

MR. REUVENI: Can I tell them the Court promised me that?

THE COURT: Yeah.

MR. REUVENI: I wanted to make just two or three quick points in response, and then I think the plaintiff is right, we should talk scheduling.

So a lot on this East Bay case. Again, just the general distinction, and that case does it too, and I know what the government argued there because I signed that brief. That

was me. So I'm not saying I'm the authority on what East Bay decided as a court, but I know what the government argued, and it's not what the Court of Appeals decided. Those are two different things, but in the district court where the argument actually came up, the government argued that there's two provisions, one that implements 8 U.S.C. § 1158 and one that then implements something specific to 1225. The first is not subject to this claim channeling provision. The second is, and the Court agreed. So that issue wasn't up on appeal. That wasn't an argument the court made on appeal.

The Ninth Circuit, I'm not really sure what they did, but they rewrote the statute to say, the Court has jurisdiction. The government didn't argue the Court of Appeals didn't have jurisdiction. That wasn't an argument we made. We argued that an organization is not within the zone of interest of the INA, and so doesn't have cause of action.

THE COURT: So standing argument.

MR. REUVENI: Yeah, on threshold, just disability argument. My friend on the other side here made a point just now that the asylum standard sort of all gelled together, and you need to look behind the screen, look behind the Wizard of Oz, if you will. I want to be clear, 1225(b)(1) has a standard, significant possibility, and then the merits determination is something entirely higher, it's a much higher threshold. So significant possibility is, one court said that's like a

10 percent chance of passing your asylum case which actually matches up with the numbers pretty closely, so.

THE COURT: Say that again.

MR. REUVENI: So significant possibility that they will be granted asylum.

THE COURT: Where does that language come from?

MR. REUVENI: 1225(b)(1)(B)(v). So that's the standard that is being applied in credible fear.

THE COURT: Okay.

MR. REUVENI: And so plaintiffs' counsel said, well, then, they go to the asylum officer and it's basically preordained, but that's wrong.

THE COURT: That's a different standard.

MR. REUVENI: Well, it's a much higher standard.

THE COURT: What's that standard?

MR. REUVENI: Show by a preponderance of the evidence that they are eligible, that they are in fact a refugee. But so this, the Court has said 10 percent of that. So you're going to get a lot more of these claims going through.

THE COURT: IFR changes that too. It goes back, I think, to a prior iteration of what a refugee is. It defines it according to some international organization standard, correct?

MR. REUVENI: Actually, no, not an international organization standard. I'm glad you brought that up, Your Honor.

THE COURT: Treaty.

MR. REUVENI: The significant possibility has been the same thing until 2019, and then -- actually until 2020. A rule called the Global Asylum Rule changed it. It wasn't joined immediately on some ground or other, and that never went into effect. But until 2020 significant possibility meant one thing and then the new rule tried to ratchet that up a bit.

THE COURT: Practice nothing.

MR. REUVENI: Nothing changes and sends it back to that. But the point really --

THE COURT: That's not going to affect asylum numbers because it hasn't ever changed.

MR. REUVENI: Right. And I do want to just defend my client a little bit. I want to quibble with the suggestion that asylum officers are suspect and are somehow not doing their job in carefully assessing whether someone is eligible for asylum.

I mean, that's plaintiffs' position. That's not in the record at this point at all. There's no evidence to that effect. Really they were only just opening the floodgates, so to speak. Just to bring it back to the jurisdictional point, at the end of the day, I mean, I agree, I think we all agree on this. Don't just take the government's word for it.

Like if I say that you're crawfish law is implementing expedited removal, you'd obviously look at me suspiciously because that's crazy. But we're so far removed from that. We have a provision that says, if you pass credible fear, do these

other things. We have no statute or regulation that articulates what those other things are other than by reference to 240 proceedings. And so I asked a colleague of mine to send me that document, by the way. I have not yet received it.

THE COURT: That's the 1998 document?

MR. REUVENI: Yeah. If the Court thinks it's relevant, if you really haven't made up your mind, I can get that to you today.

THE COURT: I would like it, but you don't have to send it to me today, just whenever you get a chance.

MR. REUVENI: Well, I'd like to get it to you quickly cause we do want these issues decided quickly. So I will commit to getting it to you as quickly as I can, and I will identify the specific language for you. If you want me to file it that in the docket or send it to chambers.

THE COURT: Just send it to chambers if you have the email.

MR. REUVENI: I'll do that and then I'll cc plaintiff. That's all I really have on those issues, Your Honor. I think if Your Honor wants to talk housekeeping.

THE COURT: Okay. All right. Thank you, sir. I appreciate it.

So I don't have any other questions for either side.

Okay. I'm going to rule on the motion right now, but that doesn't mean the issue -- this does not mean the issue goes

away. Okay. It means that I'm not going to stay or transfer the case right now.

The Court finds the defendants' motion to transfer for lack of subject matter jurisdiction and motion to stay, Doc. 5, stem from and are contingent upon the same operative facts and issues of law that governs the Court's resolution of the merits of this case, namely, whether the Executive Branch properly and in accordance with its statutory authority issued the subject interim final rule which among other things purports to create an entirely new process for adjudicating asylum claims by, one, dispensing with the adversarial process and adjudicating asylum claims, and two, vesting authority to adjudicate asylum claims in asylum officers rather than immigration judges for those asylum applications initiated under the Expedited Removal Statute which is 8 U.S.C. 1225.

Specifically, the Court must decide in its merits ruling, number one, whether the Executive Branch properly issued the IFR under that statute, the Expedited Removal Statute 1225, and two, whether the IFR was issued in contravention of other statutes governing the asylum process, including any bearing upon the federal agency process and/or personnel authorized to adjudicate asylum applications.

The defendants' contend that the IFR issues are under the authority -- the IFR issued under the authority of 825 -- 8 U.S.C. § 1225 without reference to any other statute. However,

the link between the challenged portions of the IFR and 8 U.S.C. 1225 are tangential at best. Congress did not clearly intend 8 U.S.C. § 1225 to govern how asylum applications should be adjudicated, nor is it evidence that the statutory provision in 1225(b)(1)(B)(ii) mandating the aliens determined to have a credible fear of persecution shall be, quote, detained for further consideration of the application for asylum; that this phrase authorizes the Executive Branch to create a system for adjudicating asylum applications apart from the frameworks Congress set forth in 8 U.S.C. § 1158 and 1129(a).

Because this Court has not yet been called upon to decide whether the IFR was issued in excess of its statutory authority granted by 8 U.S.C. § 1225 and, in fact, the disputed portions of it clearly bear more directly upon other statutes neither of which -- well, particularly 1158 and 1229(a), neither of which have analogous venue provisions mandating judicial review in a specific forum, the Court denies the defendants' motion at this time.

This notwithstanding, the Court shall remain cognizant of the jurisdictional limit set forth in 1252 and will dismiss or transfer this matter should the Court's legal and factual findings warrant. Okay.

Now I'm going to follow up on the motion I received yesterday which is -- well, it's the parties joint submission regarding the briefing schedule. Okay. Do you have that

Document 23? I've reviewed that, and this matter is not close to being in a posture where we can have a preliminary injunction hearing from my perspective. Okay? I'm concerned about the states' standing to bring this suit.

As I mentioned to states counsel, they have asserted their standing is based essentially on the likelihood that this change in the process of adjudicating asylum claims will lead to an increase in illegal immigration. The Court needs more before it proceeds with a preliminary injunction.

Given that the states contend, number one, that the challenges to the asylum process will lead to more immigrants being granted asylum, and two, that these changes are contrary to law, the Court orders the parties to engage in a 30-day period of limited discovery as to the likely effect this change will have on the number of immigrants granted asylum, residing in the plaintiff states, and two, the costs or other measurable effect these additional persons, which again the states contend have been illegally granted asylum, will have on the plaintiff states.

At the end of this period, the states must clearly show that they are -- and the standard at the PI stage is likely to obtain each element of standing for the Court to proceed with a preliminary injunction hearing. Okay?

So while this is ongoing, concurrently with this, and no later than June 3rd, the government will produce to plaintiffs the administrative record in this case, and I'll put this in

minutes. Okay. So you may not be able to write as fast as I'm speaking.

The government will produce to plaintiffs -- and I think that's under way, correct?

MR. REUVENI: (Nodding head.)

THE COURT: Okay. The government will produce to the plaintiffs the administrative record no later than June 3rd. The parties will brief whether 8 U.S.C. § 1252(f)(1) imposes any jurisdiction -- jurisdictional or remedial limitations on the entry of injunctive relief, declaratory relief, or relief under 5 U.S.C. 706 which the Supreme Court wanted to know about in that Texas v. Biden case we talked about, and whether these limitations are subject to forfeiture.

Three, the applicability, if any, of the ultra vires doctrine set forth in Leedom versus Kyne and Kirby versus Pená which is a Fifth Circuit case, to the defendants' issuance of the IFR under 8 U.S.C. 1225, including whether this doctrine has been properly pleaded by the plaintiffs.

The legislative history of 8 U.S.C. 1225(b)(1), and we talked about this some, and you're going to email me that document, but the legislative history and other relevant history of 1225(b)(1)(B)(ii), particularly, the legislative intent behind the phrase "shall be detained for further consideration of the application for asylum," and prior interpretations and applications of this phrase in other regulations since the

statute's enactment.

Okay. So I want that briefing by June 3rd, and the discovery period should be over by then as well. I'm sorry, the discovery period won't be over by then.

And the Court will hold a status conference on June 27th at 2:00 p.m., and we can do that on the telephone or Zoom. We'll figure that out. I'm not going to have you come back down here until we have the PI hearing if, in fact, we do have one. Okay?

MR. REUVENI: Thank you, Your Honor.

THE COURT: Plaintiffs will file briefing and evidence on or before June 15, 2022, regarding the states' standing to bring this action. This will be after the 30-day period -- hmmm, June 15th. It should say June 20th, I think, June 20th. That would be a week before the status conference.

What date is that, Emily, June 20th?

(Conferring with law clerk.)

THE COURT: And the 27th is the following Monday, I guess. Okay. Let's give the states more time than that because the discovery period will have just completed on that. The 24th is a Friday before the status conference. June 24th states will be required to file briefing on or before June 24th regarding their standing to bring this action.

We'll discuss at the status conference whether defendants want to respond to that or not. They probably will,

in which case I'll provide a time period at the status conference for that response. Okay?

At the June 27th status conference, the parties will be prepared to discuss the need for discovery, if any, beyond the administrative record, and again, there has to be a strong showing for need of that.

And also, if the Court -- I anticipate being able to set at that time a hearing date for the preliminary injunction at our June 27th status conference. Any questions?

MR. REUVENI: I just have two, Your Honor. Should I approach or stay?

THE COURT: Oh, yeah, that's fine where you are.

MR. REUVENI: That all sounds good to us. Just one clarification and then one request. So since all this other stuff is going to be occurring in the short term, are we responding -- is the government expected to respond to the motion for preliminary injunction or is that tolled for now until we get all this --

THE COURT: Yeah, good question. I don't -- we don't need that right now.

MR. REUVENI: Okay. So I guess I just request --

THE COURT: I think it's likely after they engage in the standing steps that I've outlined, that their PI motion will be amended. So don't respond to it until after the 27th status conference at which time I'll provide a briefing schedule.

MR. REUVENI: That makes sense. If you could just include a note on that in the order, that the government is relieved of its obligation to respond to the PI pending --

THE COURT: Yeah.

MR. REUVENI: -- all these other things.

THE COURT: Yeah.

MR. REUVENI: And then the second thing related to that, Your Honor, since that's going to take us pretty close up to the answer deadline in this case, which I'm not sure what it is, but it's a little bit after June 27th, I think. It might be July 5th, based on when we were served, and that's true both in this case and the case in Texas. Should we -- we'd request that you sort of either stay or extend the answer deadline so that we're not also simultaneously moving to dismiss or dealing with any of that, and we're just focused on the preliminary injunction. If you'd like us to file a motion to dismiss, it's going to be fairly repetitive of the preliminary injunction.

THE COURT: No, I know. I will say that the government -- the defendants' deadline to respond to the preliminary injunction and to file an answer or motion under Rule 12 is stayed pending the June 27th status conference. It will be reestablished at the June 27th status conference.

MR. REUVENI: Thank you, Your Honor.

THE COURT: And Mr. St. John?

MR. ST. JOHN: Your Honor, you indicated this would be

a period of limited discovery. I assume you are referring to jurisdictional discovery.

THE COURT: Yes.

MR. ST. JOHN: That would be outside of the AR. I assume that the government, or I would hope that the government would have projections and whatnot, whether or not they are in the AR about the impact of the regulation. Given the 30-day clock on normal discovery tolls, can the Court order like a 14-day clock for discovery responses?

THE COURT: Yeah. I think you'll find the defendants will work with you on that, if you can come up with something. If there's a dispute let me know, and I'll try to work it out.

MR. REUVENI: That raises one further point for me that I should just be clear on. I understood the Court's order to allow for reciprocal discovery, not just plaintiffs asking us questions, but we can ask them questions too.

THE COURT: Yeah.

MR. REUVENI: All plaintiffs' dates about their injuries and so on?

THE COURT: Yeah.

MR. REUVENI: Okay.

THE COURT: This has to do with the impact of -- well, number one, what if any change there will be to the number of asylum -- asylees in the plaintiff states, and number two, what the impact of those might be. And again, we're looking -- the

standard is whether the states are like -- have shown that they are likely to be able to establish standing as to each of the elements of standing here with regard, you know, here with the special solicitude type standing inquiry that Texas v Biden kind of laid out.

MR. REUVENI: Thank you, Your Honor. That raises one additional point, and I say this out of an abundance of caution, just knowing what I would do if I heard this later in the case if I was on the other side. I am aware of draft guidance documents that will be made public that articulate -- not yet, so it's in deliberative stage, but I want to flag this now so it doesn't sound like the government has done this to move the goalpost later.

But as of right now, there are documents that will articulate, as I discussed earlier with you, limitations on where this is going to be deployed, what geographic areas and other sort of requirements that are not in the rule itself, and those are still being worked on and reviewed internally at the agency and will be made public in due course, I think certainly well ahead of June 27th and before discovery closes, but that is certainly going to affect some of these arguments, and we'll, of course, disclose that as soon as we have it to the Court and plaintiffs. But I just phrase that now because I'm concerned what would happen if I were on the other side. I would say, Oh, they issued that after your Court's order to moot out the case.

So I'm just letting you know now that is happening. There are specific limited jurisdictions where this is going to be deployed, initially at least, and that will all be made public, that we won't be hiding the ball on that. We'll just let everyone know that when we have it, but the guidance is not final yet.

THE COURT: So you bring that up for what point?

MR. REUVENI: Well, I would expect plaintiffs to potentially argue --

THE COURT: So you are saying that it might impact their standing if the areas where the government is going to first implement this is not in Arizona?

MR. REUVENI: For example, correct. So if it's only going to be implemented in -- I'm just making things up here, but one or two specific states.

THE COURT: Yeah.

MR. REUVENI: And none of those states are the plaintiffs.

THE COURT: Yeah.

MR. REUVENI: I mean.

THE COURT: California and Montana, huh? Canadians are worried.

MR. REUVENI: I think I can predict with confidence that it won't be Montana. It might be California for obvious reasons.

THE COURT: Yeah, okay.

MR. REUVENI: That's the only reason I bring it up.

THE COURT: Okay. I appreciate that, and that -- when you have that, I know you'll produce it. I also know you offer it in good faith. I hold the Department of Justice in high regard, and I know that you will operate in good faith to try to not intentionally drag your feet on this providing information to their requests. Again, I think a lot of the work that the states need to do may be internal --

MR. ST. JOHN: Understood, Your Honor.

THE COURT: -- with state agencies to figure out what the costs are of people who have been granted asylum residing in their states, and then of course the external component is going to be what the projection -- I mean, from what I can see. I'm not -- I'm trying to maybe how this goes, but what the effect is on the numbers that the states are contending is illegal. Any increase would be illegal under this program, according to the states' position, and therefore that would give them standing if there is a cost associated with having asylums in the states.

So, I mean, to me that seems like the clearest kind of -- really, you know, this has to do with -- Largely the complaint and the preliminary injunction has to do with the change to the asylum process that may or may not result in additional asylees which then may or may not result in more asylees living in the states, and so I think beyond that, saying

it's going to influence people in Mexico and Central America or other places to then try to evade law enforcement and increase illegal immigration, I think -- I mean, if the states want to try to use that -- if that's the argument the states use, I'm not going to tell them they can't use it, but I don't -- I'm jut saying, I don't really see that as a viable standing argument. All right?

MR. ST. JOHN: Understood, Your Honor, thank you.

MR. REUVENI: Thank you, Your Honor.

THE COURT: You going to make your flight?

MR. REUVENI: I hope so.

THE COURT: Court's in recess.

(Hearing concluded.)

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C E R T I F I C A T E

I, Cathleen E. Marquardt, RMR, CRR, Federal Official Court Reporter, do hereby certify this 22nd day of May, 2022, that the foregoing pages 1-82 constitute a true transcript, to the best of my ability, of proceedings had in the above-entitled matter.

/s/ Cathleen E. Marquardt
Federal Official Court Reporter